**No. 21-8005**

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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**AMERICAN PETROLEUM INSTITUTE; EXXON MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; KOCH INDUSTRIES, INC.; FLINT HILLS RESOURCES LP; AND FLINT HILLS RESOURCES PINE BEND, LLC,**
*Petitioners*,

***v.***

**STATE OF MINNESOTA,**
*Respondent*

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ON PETITION FOR PERMISSION TO APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA (CIV. NO. 20-1636)
(THE HONORABLE JOHN R. TUNHEIM, C.J.)

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# RESPONDENT'S ANSWER IN OPPOSITION TO PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1453(C)

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Pursuant to Federal Rule of Appellate Procedure 5(b)(2), Respondent-Plaintiff State of Minnesota (the "State") files this answer in opposition to the Petition of Petitioners-Defendants American Petroleum Institute, Exxon Mobil Corporation, ExxonMobil Oil Corporation, Koch Industries, Inc., Flint Hills Resources LP, and Flint Hills Resources Pine Bend, LLC ("Defendants") seeking the Court's permission to appeal the District Court's March 31, 2021 order remanding this case to state court. (Pet. Appx. 1. ("Order").)

## INTRODUCTION

Defendants' Petition improperly seeks review of the District Court Order under the Class Action Fairness Act, including review of additional non-reviewable grounds for removal rejected in the same Order, which Defendants have already sought to appeal in a separate Eighth Circuit matter, Docketed as Case Number 21-1752. In granting the State's motion to remand, the District Court joined six other district courts and four circuit courts that have rejected many of the same defendants' improper attempts to remove similar climate deception cases from state courts around the country.[1] Defendants now seek a discretionary appeal of the

[1] *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) ("*San Mateo I*"), *aff'd in part, appeal dismissed in part*, 960 F.3d 586 (9th Cir. 2020), *reh'g en banc denied* (Aug. 4, 2020) ("*San Mateo II*"), *petition for cert. filed*, No. 20-884 (Jan. 4, 2021); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019) ("*Baltimore I*"), *as amended* (June 20, 2019), *aff'd in part, appeal dismissed in part*, 952 F.3d 452 (4th Cir. 2020) ("*Baltimore II*"), *cert.*

District Court's Order based on an interpretation of the Class Action Fairness Act ("CAFA") that appellate courts have consistently rejected.[2] The Court should deny the Petition without delay because there is a glaring and fatal flaw with the Defendants' Petition: *This case is not a class action*. The discretionary review provisions in 28 U.S.C. § 1453(b) do not apply in the first place; the Court lacks jurisdiction to hear this appeal.

Every appellate court that has considered the issue has rejected Defendants' contention here. Courts have universally concluded that a *parens patriae* action cannot be transmogrified into a class action subject to CAFA. *See* 2 n.2, *supra*.

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*granted*, 141 S. Ct. 222 (2020); *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019) ("*Boulder I*"), *aff'd in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2020) ("*Boulder II*"), *petition for cert. filed*, No. 20-783 (Dec. 8, 2020); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019) ("*Rhode Island I*"), *aff'd in part, appeal dismissed in part*, 979 F.3d 50 (1st Cir. 2020) ("*Rhode Island II*"), *petition for cert. filed*, No. 20-900 (Jan. 5, 2021); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020); *City & Cty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW, 2021 WL 531237 (D. Haw. Feb. 12, 2021) ("*Honolulu*"), *appeals filed*, Nos. 21-15313 & 21-15318 (9th Cir. Feb. 23, 2021); *Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 1215656 (D. Minn. Mar. 31, 2021).

[2] *See Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 213 (2d Cir. 2013) (finding that a *parens patriae* action is not a class action under CAFA); *LG Display Co. v. Madigan*, 665 F.3d 768, 770–72 (7th Cir. 2011) (same); *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 848–49 (9th Cir. 2011) (same); *W. Va. ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 174–78 (4th Cir. 2011) (same); *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 799 (5th Cir. 2012) (same), *rev'd on other grounds*, 571 U.S. 161 (2014); *Nessel ex rel. Michigan v. AmeriGas Partners, L.P.*, 954 F.3d 831, 833 (6th Cir. 2020); *see also Massachusetts*, 462 F. Supp. 3d at 47–51 (same).

Even if the Court had jurisdiction to review the District Court's rejection of Defendants' mischaracterization of the Complaint as a "class action," this case does not warrant discretionary review because it does not present novel and important issues that would develop the body of CAFA jurisprudence. *See* S. REP. 109-14, 49, 2005 U.S.C.C.A.N. 3, 46; *Coll. Of Dental Surgeons Of Puerto Rico v. Connecticut Gen. Life Ins. Co.*, 585 F.3d 33, 38 (1st Cir. 2009) ("[T]he discretion granted under section 1453(c) is designed, in large part, to 'develop a body of appellate law in interpreting the legislation.'").

The Court should also reject Defendants' attempts to use CAFA to obtain review of unappealable aspects of the District Court's Order relating to federal common law and *Grable*[3] jurisdiction. Review of these issues is generally prohibited by 28 U.S.C. § 1447(d), and CAFA was not intended to create a new layer of *de novo* review of otherwise unappealable issues. Granting review here would serve no purpose but delay and could invite future abuse of CAFA's discretionary review provisions. Further, Defendants' federal common law and *Grable* arguments lack merit and have been consistently rejected by the Ninth Circuit and federal district courts across the country. *See* 1 n.1, *supra*.

[3] *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005).

Finally, the balance of harms weighs against granting the Petition, and Defendants' request to hold this Petition in abeyance pending resolution of their concurrently filed appeal is improper and runs counter to the purpose of CAFA's expedited review provisions.

## STATEMENT OF THE CASE

The State originally filed this suit against Defendants in Minnesota state court on June 24, 2020. The State's claims stem from Defendants' campaign to deceive and mislead the public and consumers about the devastating impacts of climate change and its link to fossil fuels, which led to disastrous impacts caused by profligate and increased use of Defendants' products. D. Ct. Dkt. 1-1 ("Compl.") ¶¶ 2–6. The Complaint brings claims for (1) violations of the Minnesota Consumer Fraud Act, Minn. Stat. § 325F.69; (2) failure to warn; (3) fraud and misrepresentation; (4) violations of the Minnesota Deceptive Trade Practices Act, Minn. Stat. § 325D.44; and (5) violations of the False Statement in Advertising Act, Minn. Stat. § 325F.67. *Id.* at ¶¶ 184–242. The alleged false and misleading statements are illegal under these asserted state-law grounds. None of these counts assert any form of class action.

Defendants removed the action to federal court on July 27, 2020, and the State moved to remand. On March 31, 2021, the District Court granted the State's motion to remand, rejecting each of the seven grounds for removal set forth in Defendants'

notice of removal. As to CAFA, the court held that Defendants "identified no state statute or procedural rule that would classify a suit of this nature as a class action" and noted that "every court to have addressed the application of CAFA to actions brought by a State in *parens patriae* under state common law or consumer protection statutes has found that CAFA is not applicable." *See* Order at 31. The District Court rejected every other ground for removal as well.

On April 1, 2021, Defendants filed a notice of appeal pursuant to 28 U.S.C. § 1447(d). Under the law of this Circuit, Defendants may seek review under section 1447(d) of only one of their alleged bases for removal—federal officer jurisdiction. *See Jacks v. Meridian Res. Co.*, LLC, 701 F.3d 1224, 1229 (8th Cir. 2012). Defendants' 1447(d) appeal is currently pending before the Court in Case No. 21-1752. On April 12, 2021, Defendants filed this Petition. Although Defendants may urge the Court to review unappealable aspects of the District Court's Order in both their appeal and this Petition, as explained more thoroughly below, the Court cannot and should not do so.

Defendants also filed a motion to stay the remand order, arguing, *inter alia*, that remand should be stayed pending resolution of the pending appeal and this Petition. D. Ct. Dkt. 87.

## REASONS FOR DENYING THE PETITION

### I. The Court Lacks Jurisdiction to Grant the Petition Because This Case Is Not (and Never Was) a Class Action.

This case is a *parens patriae* action, brought by the Attorney General to vindicate the State's sovereign and quasi-sovereign interests. Every court to consider whether a *parens patriae* action is subject to CAFA, including the District Court, has reached the same conclusion: a case like this, a consumer-protection action brought by a state attorney general, is not a class action subject to CAFA. *See* 2 n.2, *supra*. Therefore, the Court must deny the Petition for lack of jurisdiction.

Orders remanding a case to state court are generally not reviewable on appeal or otherwise. 28 U.S.C. § 1447(d).[4] "There is an exception, however, for cases invoking CAFA." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 85-86 (2014); *see Purdue*, 704 F.3d at 212 (describing CAFA as a "narrow expansion of jurisdiction"). CAFA provides:

> Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a *class action* to the State court from which it was removed.

28 U.S.C. § 1453 (emphasis added).

[4] Section 1447(d) has an exceptions clause, not applicable here, which allows for limited review of a remand order to the extent it rejects jurisdiction under the federal officer removal statute (28 U.S.C. § 1442) and the civil rights removal statute (28 U.S.C. § 1443).

CAFA defines "class action" as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). It is undisputed that this case was not commenced under Federal Rule of Civil Procedure 23. Nor was it filed under a similar State statute or rule.

A state attorney general has standing to sue using *parens patriae* authority where it can articulate an interest "apart from the interests of particular private parties," such as "the health and well-being—both physical and economic—of its residents in general." *LG Display Co.*, 665 F.3d at 771. In contrast, a class action is brought on behalf of a discrete group of identifiable individuals. *See id.* Here, the Attorney General has brought this suit pursuant to his statutory authority under Minnesota Statute section 8.31 and as a *parens patriae* suit on behalf of State residents and consumers in general, not on behalf of a class of particular individuals of whom the Attorney General is a typical representative. *See id.* at 771–72.

*Purdue*, just like this case, involved the defendants' petition for a discretionary appeal under CAFA to challenge the remand of a *parens patriae* action. *See Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208 (2d Cir. 2013). The

Second Circuit held, as have the Fourth, Fifth, Sixth, Seventh, and Ninth Circuits,[5] that *parens patriae* suits are not removable under CAFA. *Id*. at 212. The Second Circuit reasoned that the suit was "filed not by a class representative on behalf of similarly-situated plaintiffs, but by the Attorney General on behalf of the sovereign." *Id*. at 217. The court found that, unlike a class representative, "the Attorney General is not designated as a member of the class whose claim would be typical of the claims of class members." *Id.* (quoting *CVS Pharmacy, Inc.*, 646 F.3d at 176). Moreover, the Attorney General in *Purdue* did not need to demonstrate standing through a representative injury or obtain class certification to seek relief on behalf of absent class members. *Id.* (citing *Chimei Innolux* Corp., 659 F.3d at 848). The court concluded that *parens patriae* suits lack equivalency to Rule 23 in both form and function and denied the defendants' petition. *Id*. at 217, 221. Defendants' sole basis for review of the Petition has already been repeatedly rejected by every appellate court to address it. Defendants point to no contrary authority from any court at any level of the federal judiciary, and the State is aware of none.

Section 8.31 of Minnesota Statutes, which grants the Attorney General standing to enforce the State's consumer protection laws, similarly lacks

[5] *Purdue Pharma L.P.*, 704 F.3d 208, 213; *CVS Pharmacy, Inc.*, 646 F.3d 169, 174–78; *Nessel ex rel. Michigan v. AmeriGas Partners, L.P.*, 954 F.3d 831, 833; *AU Optronics Corp.*, 701 F.3d 796, 799; *LG Display Co.*, 665 F.3d 768, 770–72; *Chimei Innolux Corp*., 659 F.3d 842, 848–49.

equivalency to Rule 23. There are no requirements of adequacy, numerosity, commonality, or typicality. Minn. Stat. § 8.31. There are no procedures similar to those under Rule 23. *Id.* Courts have rejected class action removal attempts for consumer protection claims when these procedures are lacking, even where the authorizing statue expressly refers to an attorney general's suit as a "class action," which Minnesota's does not. *Nessel ex rel. Michigan v. AmeriGas Partners, L.P.*, 954 F.3d at 837; *see also Massachusetts*, 462 F. Supp. 3d at 50 (rejecting federal jurisdiction over statutory consumer-protection claims for lack of similarity with Rule 23 and because the statute, like Minnesota's, allows for remedies such as civil penalties and restitution).

These principles govern this Petition. This case was brought based on the statutory and *parens patriae* authority of the Attorney General and not under Rule 23 or an analogous state statute. This case is not a class action, CAFA's appellate review provisions do not apply, and this Court lacks jurisdiction to accept an appeal from the District Court's remand order under section 1453.

## II. Even if the Court Reaches the Question, Discretionary Review Is Not Warranted Because the Petition Does Not Present a Novel and Important CAFA Issue.

Appeals under CAFA are discretionary. *Froud*, 607 F.3d 520, 522 (8th Cir. 2010). In this context, "[a] sound exercise of discretion will be guided by consideration of the importance and novelty of the issues raised by the case." *Est. of*

*Pew v. Cardarelli*, 527 F.3d 25, 29 (2d Cir. 2008). Congress granted the courts discretion to take up a CAFA appeal under § 1453(c) to "develop a body of appellate law interpreting the legislation." S. REP. No. 109–14, at 49 (2005), 2005 U.S.C.C.A.N. at 46. Accordingly, the presence of an important CAFA-related question is a key factor in considering a section 1453 application for leave to appeal, while the presence of non-CAFA issues, even important ones, is not. *See Coll. of Dental Surgeons*, 585 F.3d at 38.

The sole CAFA-related question raised by the Petition—whether this consumer-protection case can be construed as a class action—is far from novel. Four other circuits have considered this issue, and each concluded that CAFA does not apply to *parens patriae* actions like this one. *See Purdue Pharma L.P.*, 704 F.3d at 212; *LG Display Co.*, 665 F.3d at 770–72; *Chimei Innolux Corp.*, 659 F.3d at 848–49; *Nessel ex rel. Michigan*, 954 F.3d at 833; *CVS Pharmacy, Inc.*, 646 F.3d at 174–78; *AU Optronics Corp*., 701 F.3d at 799. Absent an important CAFA-related question, the "presence" of the federal common law and *Grable* questions does not warrant discretionary review. *See Coll. of Dental Surgeons of Puerto Rico*, 585 F.3d at 38.

When an issue is "straightforward," an appellate court may deny leave to appeal on the basis of a section 1453 petition alone. *Purdue Pharma L.P.*, 704 F.3d at 212. The Second Circuit did just that when presented with the same question raised

by this Petition, holding in that case that "the answer is straightforward . . . *parens patriae* suits are not removable as 'class actions' under CAFA." *See id.* at 212, 221. This Court should reach the same conclusion and deny the Petition presented here.

## III. The Court Should Not Consider the Federal Common Law or *Grable* Questions.

If remand had been granted solely on the issues of federal common law and *Grable* jurisdiction, 28 U.S.C. § 1447(d) would bar review of the District Court's order.[6] *See Jacks*, 701 F.3d at 1229 (pursuant to section 1447(d), Court lacked jurisdiction to hear appeal of remand order to the extent appeal challenged district's court finding that there was no federal question jurisdiction). Review of those issues does not fit within section 1453(c)(1)'s purpose, which is "to develop a body of appellate law interpreting [CAFA] without unduly delaying the litigation of class actions." S. REP. 109-14, 60, 2005 U.S.C.C.A.N. 3, 56. Where review of a non-CAFA basis for removal "would clearly not advance that purpose and would also not otherwise be allowable under § 1447(d)," the Court should decline to consider such basis. *See Boulder II*, 965 F.3d at 811-13.

[6] Section 1447(d) provides "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 [federal officer jurisdiction] or 1443 [civil rights jurisdiction] of this title shall be reviewable by appeal or otherwise."

CAFA was never designed to implicate unrelated jurisdictional issues writ large. *See* S. REP. 109-14, 60, 2005 U.S.C.C.A.N. 3, 56. Congress did not intend to create a new layer of *de novo* interlocutory appellate review whereby various flavors of federal subject matter jurisdiction could be entirely re-litigated by simply alleging a case is a class action. That approach would go too far. *See id*.

The Court has dealt this scenario before. In *Jacks*, as here, the defendants filed both an appeal as of right under 28 U.S.C. § 1291 and a CAFA petition. *Jacks* 701 F.3d at 1228, n.2. In that case, this Court first denied the defendants' CAFA petition and then, in ruling on the appeal as of right, determined it lacked jurisdiction under section 1447(d) to review the district court's determination as to federal common law. *Id*. at 1228 n.2, 1229. The Court should follow the *Jacks* approach here and deny the CAFA petition without reaching any non-CAFA jurisdictional issues.

The cases cited by Defendants provide neither guidance nor authority on this issue: neither case addressed the scope of review on a CAFA petition, and both cases involved proper CAFA appeals.[7]

[7] See Pet. at 7 (citing *Wullschleger v. Royal Canin U.S.A., Inc.*, 953 F.3d 519, 520 (8th Cir.), *cert. denied*, 141 S. Ct. 621 (2020); *George v. Omega Flex, Inc.*, 874 F.3d 1031 (8th Cir. 2017)).

## IV. Defendants' Arguments Regarding Federal Common Law and *Grable* Jurisdiction Are Meritless.

The Court should never reach the federal common law or *Grable* issues for all the reasons set forth above. But if it did, Defendants' arguments would still fail. The District Court correctly determined that the Complaint did not have a substantial relationship to federal common law and that Defendants failed to meet each and every applicable *Grable* factor. These questions were not close and certainly do not warrant discretionary review under CAFA.

### A. The District Court Properly Rejected Federal Common Law as a Basis for Federal Jurisdiction

The District Court properly rejected Defendants' argument that the State's claims arise under federal common law. The court reasoned that there were only two exceptions to the well-pleaded complaint rule—complete preemption and *Grable* jurisdiction—neither of which applied here. Order at 15–21. The court dismissed Defendants' attempt to carve out a new, third exception, and found that Defendants' "proffer [of] multiple theories for how Plaintiff's claims might be related to federal common law . . . lack[ed] a substantial relationship to the actual claims alleged and would require the Court to invent a separate cause of action." *Id.* at 16–17.

In rejecting Defendants' arguments, the District Court found that Defendants' theories would require the court "to weave a new claim for interstate pollution out of the threads of the Complaint's statement of injuries," which it described as "a

bridge too far." Order at 13. The District Court "decline[d] Defendants' invitation to interpret this well-pleaded consumer protection action as a wholesale attack on all features of global fossil fuel extraction, production, and policy." *Id*. at 14. The District Court rejected Defendants' misguided attempt to "establish a separate and independent exception to the well-pleaded complaint rule [that] lacks support in this circuit and is contrary to Supreme Court precedent." *Id*. at 16. Defendants' theories of how the Plaintiff's claims invoked federal common law were so fanciful that the Court held they lacked "a substantial relationship to the actual claims alleged and would require the Court to invent a separate cause of action." *Id*. at 16–17.

The District Court's order is consistent with decisions by the Ninth Circuit and six other district courts that reached the same conclusion regarding federal common law in substantially similar cases. *See Oakland*, 969 F.3d at 906; *San Mateo I*, 294 F. Supp. 3d at 937; *Baltimore I*, 388 F. Supp. 3d at 555; *Boulder I*, 405 F. Supp. 3d at 963–64; *Rhode Island I*, 393 F. Supp. 3d at 148–49; *Massachusetts*, 462 F. Supp. 3d at 43–44 (D. Mass. 2020); *Honolulu*, 2021 WL 531237, at *2 n.8.

The Second Circuit's recent decision in *City of New York v. Chevron Corp.*, No. 18-2188, 2021 WL 1216541 (2d Cir. Apr. 1, 2021), does not suggest, much less require, a different result here. There, "the City filed suit in federal court in the first instance," and the court expressly distinguished cases like this one and the "parade of recent opinions" granting remand to state court in analogous cases, where "the

plaintiffs brought state-law claims in state court." *Id.* at *8. The court held that because the case was initiated in federal court and the decision appealed from was an order granting a motion to dismiss, rather than an order resolving a motion to remand, it would consider "the [defendants]' preemption defense on its own terms, not under the heightened standard unique to the removability inquiry." *Id. City of New York* explains that it is directed to a different question than the one before the District Court here. Its analysis of federal common law as a matter of ordinary preemption is consistent with the many analogous decisions granting remand.[8]

The Defendants' Petition does nothing to explain how or why this Court should enter the fray, particularly in light of the District Court's findings. This case was initiated in state court on state law claims. Under the authority presented above, it was properly remanded to state court.

**B. The District Court Properly Rejected Removal Based on *Grable*.**

Similarly, the District Court correctly concluded that *Grable* jurisdiction does not exist here, finding that Defendants could not prevail on any of the elements of

[8] Defendants' reliance on *In re Otter Tail Power Co.*, 116 F.3d 1207 (8th Cir. 1997), is also misplaced. *See* Pet. at 17–18. First, the case pre-dates *Grable*, in which the Supreme Court set forth the governing framework for analyzing whether a state law claim raises substantial, disputed question of federal law. Second, in *Otter Tail*, unlike here, the plaintiffs' claims explicitly relied upon interpretations of a discrete area of federal law. 116 F.3d at 1213–14. The claims involved issues of tribal regulatory authority and raised questions of federal law requiring interpretation of treaties, federal statutes, and federal common law of inherent tribal sovereignty. *Id.*

the *Grable* test. *See* Order at 17–22. The District Court found that "[c]ontrary to Defendants' assertions, the Complaint does not require interpretation of any federal environmental regulations or climate treaties, nor does it ask a court to review federal agencies' management of interstate waters." *Id.* at 18. The District Court concluded:

> Accepting Defendants' interpretation of *Grable* jurisdiction would require the Court to make an exceptional logical leap and interpret this Complaint as a full-scale assault on all aspects of fossil fuel extraction, production, distribution, and use. That is not what the Complaint asserts on its face, and it is not within the Court's authority to rewrite the Complaint and make it so.

*Id*. at 22.

The Ninth Circuit and six other district courts have rejected identical arguments concerning *Grable* jurisdiction. *See Oakland*, 969 F.3d at 906–07; *Honolulu*, 2021 WL 531237, at *2 n.8; *Rhode Island I*, 393 F. Supp. 3d at 150–1; *Cty. of San Mateo I*, 294 F. Supp. 3d at 938; *Boulder I*, 405 F. Supp. 3d at 965–68; *Massachusetts*, 462 F. Supp. 3d at 44–45; *Baltimore I*, 388 F. Supp. 3d 558–61.

The District Court properly rejected Defendants' assertion that proving an element of the State's claims will require adjudication of disputed and substantial federal questions, reasoning that "Defendants overstate both the State's claims and what is required to prove them under Minnesota law." *See* Order at 19–20. Moreover, contrary to Defendants' arguments, Pet. at 19, the State's claims do not depend on overturning the validity of a federal act, and the federal government has made no policy decision holding that companies should be able to produce and sell

fossil fuels while concealing and mispresenting the known dangers of their use. *See Oakland*, 969 F.3d at 907-08 (assertion that state law claim implicated variety of "federal interests" did not "raise a substantial question of federal law for the purpose of determining whether there is jurisdiction under § 1331").

The Defendants' Petition does nothing to explain how or why this Court should disrupt the district court's decision to remand the case, particularly where it was consistent with a wealth of instructive authority. *Grable* jurisdiction simply does not apply. The district court correctly remanded this state-law case to state court where it belongs.

## V. The Balance of Harms Favors Denial of the Petition.

Some appellate courts consider the balance of harms in evaluating CAFA petitions.[9] For example, the First Circuit only addressed this factor after finding that the Petition presented an "important, unsettled, and recurrent" CAFA question, that the "district court's resolution of the question appears to rest on shaky ground," and that "the lower court's ruling [was] ripe for review." *See Coll. Of Dental Surgeons Of Puerto Rico*, 585 F.3d at 39.

[9] *Coll. Of Dental Surgeons Of Puerto Rico v. Connecticut Gen. Life Ins. Co.*, 585 F.3d 33, 39 (1st Cir. 2009); *Dominion Energy, Inc. v. City of Warren Police & Fire Ret. Sys.*, 928 F.3d 325, 335 (4th Cir. 2019); *Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100-1101 (9th Cir. 2010)

Given the landslide of adverse authority, granting the Petition would do nothing to advance the law and serve only to delay resolution of this matter. That is a result CAFA was intended to avoid. *See* S. REP. 109-14, 49, 2005 U.S.C.C.A.N. 3, 46 ("The purpose of [§ 1453(c)] is to develop a body of appellate law interpreting the legislation **without unduly delaying the litigation of class actions**." (emphasis added)).

Yet in a remarkably cynical approach, Defendants are deploying CAFA to effectuate delay. The irony should not be lost on the Court, and such tactics should not be countenanced. Defendants have already filed a motion with the District Court to stay the remand order pending resolution of this Petition and their concurrently filed appeal, D. Ct. Dkt. 87, and they have requested that this Petition be held in abeyance pending disposition of that appeal, Pet. at 22. The State filed its complaint almost a year ago, and there have been no substantive developments since that time. No motions to dismiss or responsive pleadings have been filed, no discovery has been propounded, and there is no litigation schedule. The Court should deny the Petition so the State can vindicate its rights without delay in state court, where this case belongs.

## VI. The Petition Should Be Denied Without Delay.

Defendants' request to hold the Petition in "abeyance" pending resolution of their concurrent appeal is inconsistent with the purpose of the CAFA and should be

denied. *See* Petition at 22. In drafting CAFA, Congress deliberately "impose[d] time limits" to avoid undue delay. *See* S. REP. 109-14, 88, 2005 U.S.C.C.A.N. 3, 46. Accordingly, CAFA provides that if an appellate court accepts an appeal pursuant to section 1453, the court must "complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed." 28 U.S.C. § 1453. The 60-day period begins to run when the petition is granted. *Est. of Pew*, 527 F.3d at 29. Defendants seek to side-step the 60-day time limit and further delay this litigation by asking the Court to hold the Petition in abeyance pending resolution of their concurrently filed appeal, which will likely raise a number of the same issues presented in the Petition. The Court should reject this stall tactic and blatant attempt to get two bites at the apple.

## CONCLUSION

For the foregoing reasons, the Petition should be denied without delay.[10]

[10] In the unlikely event the Court grants the Petition, the State respectfully requests that the CAFA appeal be consolidated with Defendants' appeal in Case No. 21-1752.

Dated: April 22, 2021

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(g), I certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B)(i). This brief contains 4,815 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 32(f).

This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the document has been prepared in a proportionally spaced typeface using Microsoft Word 2016, Times New Roman 14-point font.

*/s/ Victor M. Sher*
Victor M. Sher

## CERTIFICATE OF SERVICE

I, Victor M. Sher, hereby certify that on April 22, 2021, I caused a copy of the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*/s/ Victor M. Sher*
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